United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2125

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2125

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERTO QUINONES, a/k/a
ISMAEL QUINONES,

Appellant.

BRIEF AND APPENDIX FOR APPELLANT

ROBERT BLOSSNER, ESQ..
250 Broadway
New York, New York 1007

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ROBERTO QUINONES, a/k/a ISMAEL QUINONES,

Appellant.

- -X

BRIEF FOR APPELLANT

STATEMENT

This is an appeal from a denial of a post-conviction motion pursuant to 28 U.S.C Section 2255, (PALMIERI, J.), after an evidentiary hearing, decision having been rendered on July 24, 1974. See opinion in Appendix hereto.

Appellant was indicted on April 3, 1972 upon two counts charging violation of Title 21, U.S.C. Sections 812, 841 (a) (1) and 841 (b) (1) (A). After having entered a plea of not guilty on April 17, 1972, a plea of guilty to Count Two was entered on June 7, 1972.

On September 11, 1972, Appellant was sentenced upon the interposed plea of guilty to a term of 12 years and 3 years special parole, the sentence to run concurrently with a 7 year State sentence Appellant was serving.

A letter sent by Appellant to the HON. EDMUND L. PALMIERI, U.S.D.J. was construed as a petition pursuant to 28 U.S.C Section 2255 and accordingly a hearing commenced on June 18, 1974. The denial was rendered on July 24, 1974, as set forth in the Appendix hereto.

Appellant specifically contended that when he interposed a plea of guilty to the Second Count on June 7, 1972, it was upon the representation of his attorney, Charles T. McKinney, Esq., that a sentence of 7 years would be imposed by the Court to run concurrent with a

7 year sentence he was serving in a States Prison.

THE ISSUE

Appellant, having been sentenced in the Supreme Court of New York State to a term of 7 years, it would be incredible to believe that he would have relinquished his right to a trial herein and plead guilty under the instant Federal Indictment without any specific understanding as to what term would be meted out to him. Counsel, under such circumstances, certainly would have given Appellant inefective assistance if he allowed such plea without any reasonable Committment. Appellant was already serving 7 years and to blindly plead guilty and be subjected to a possible additional 15 years is unreasonable to believe.

POINT 1

APPELLANT'S PLEA OF GUILTY SHOULD BE VACATED.

Years of freedom are very precious commodities. In the plea bargaining process it is only fair and logical that a defendant be advised in clear and unambiguous language what specific term he has bargained for in waiving a trial. Before pleading guilty, it is sound reasoning that in discussing such plea, what sentence the defendant would be subjected to by the Court is implied. The basic concept of imprisonment is rehabilitation. The 7 year term and the additional, although

concurrent, 12 years seems inimical to rehabilitation. No competent attorney would allow a defendant to plead guilty without a trial under the circumstances.

An egregious error exists in the plea bargaining process where freedom is relinquished and the right to a trial is yielded without the knowledge as to the unequivocal consequences of the relinquishments of a defendant's rights. To purchase property, the price of which would not exceed a certain sum, and the fixed sum be left solely to the discretion of the seller, cannot be acceptable in our civilized, democratic society.

This proceeding calls into question the validity of a sentence imposed upon Appellant following a plea of guilty. It is contended that said plea was entered by Appellant upon his understanding that the sentence would be concurrent and co-extensive with his State sentence.

The Court below, during the hearing, observed, inter alia, as follows:

> " . . . And it would seem, from the testimony that this man has given this afternoon, that he is unable to distinguish between what is concurrent and what is co-extensive and concurrent with, and he confuses, I think, a concurrent sentence, plain and simple, with a seven year concurrent sentence. And he may have been under the mistaken impression, although I don't see how he could have been . . ." (Hearing Minutes, pg. 54-55)

It is submitted, under the circumstances herein,

that if a misunderstanding occurred, the plea is vitiated. If a guilty plea is "unfairly obtained or given through ignorance, fear or inadvertance, it must be vacated. " Kercheval vs. U.S. 274 U.S. 220, 224 (1927).

Judge Weinstein noted, in U.S. v. Mancusi, 275 F. Supp. 508, at 515 (1967):

> If we find that there was no such official threat or promise, we must decide whether the defendant believed such a promise or threat had been made and whether his belief "induced" the plea. The finding and standard in this second stage can be characterized as "subjective" since an inquiry into the individual defendant's state of mind is involved.

Judge Weinstein goes on to say:

> If the actor, i.e., the defendant, believes that a promise has been made, the effect on his state of mind is exactly the same as if such a promise had in fact been made. If the defendant's interpretation of the representations, though wrong, was reasonable and he was therefore misled into pleading guilty, then a plea of guilty must be withdrawn. (at 516).

This issue received further comment in U.S. v. Gilligan, 256 F. Supp 244 (1966).

If Appellant believed, as he says he did, that the sentence he testified to was possible, and, more, had been promised to him, he did not fully understand the consequences of his plea of guilty and, therefore, that

plea was not voluntarily entered. McCarthy v. United States, 394 U.S. 459 (1969). Thus, Appellant's ability to use his judgment was impaired by his misunderstanding concerning the co-extensiveness of the sentence he would receive. Moreover, even if it could be said that his counsel did not intentionally mislead him, it has been held that even an innocent misrepresentation by a defendant's attorney, (an officer of the Court, after all), if reasonably relied on by the defendant, may invalidate his plea of guilt. United States ex rel. Thurmond v. Mancusi, 270 F. Supp 508 (1967); United States v. Schneer, 194 F 2d 598 (3rd Cir. 1952).

Needless to say, in pleading guilty a defendant waives certain fundamental constitutional rights. Boykin v. Alabama, 395 U.S. 238 (1969). While the mandated (People v. McKennion, 27 N.Y. 2d 671 (1970); People v. Beasley, 25 N.Y. 2d 483 (1969))hearing was afforded the Appellant in this case, it by no means clearly emerged from that hearing that Appellant waived those rights knowingly, voluntarily and with a full understanding of the consequences of his act.

This Appellant's previous experience as to plea taking appears to be based upon his experience in the State Court. It is submitted that it is a matter of common knowledge that defendant's thereat, prior to taking a plea,

practically without exception, answer negatively to a Court's query as to whether any promises had been made to induce such plea. Such procedure is so common that it practically requires that judicial notice be taken. Within this context, Appellant's answers to the plea-taking Court's queries is understandable and explainable as non-contradictory to his assertions herein.

CONCLUSION

APPELLANT URGES THAT IF HIS POSITION IS NOT ACCEPTABLE REGARDING THE EXPECTATION BASED UPON COUNSEL'S REPRESENTATION THAT HE WOULD RECEIVE A SEVEN YEAR CONCURRENT TERM, THEN ALTERNATIVELY, IN THE INTERESTS OF JUSTICE, THAT HIS PLEA BE SET ASIDE AND THAT HE BE ACCORDED THE TRIAL THAT DUE PROCESS OF LAW ENTITLES HIM TO.

Respectfully submitted:

ROBERT BLOSSNER
250 Broadway
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

ROBERTO QUINONES,
a/k/a ISMAEL QUINONES,

Defendant.

72 Cr. 385 (ELP)

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PALMIERI, J.

The attached letter is construed as a petition pursuant to 28 U.S.C. § 2255 for leave pursuant to Fed. R. Crim. P. 32(d) to withdraw a plea of guilty and to vacate the judgment of conviction entered on September 11, 1972. On June 18, 1974, a hearing on the allegations of this petition was held. Petitioner was represented by assigned counsel and his attorney at the time of plea and sentencing, as well as petitioner, himself, testified.

The only cognizable ground that petitioner alleges in support of this petition is that he was not effectively represented because his court-appointed attorney told him that the Government had "offered" a

sentence of seven years to run concurrently with petitioner's state sentence in return for a plea of guilty. The Assistant United States Attorneys in charge of petitioner's prosecution have submitted affidavits denying any such representation. Similarly, at the hearing petitioner's attorney categorically denied that he conveyed any such offer to petitioner. Moreover, the record clearly reflects that petitioner was advised of the maximum penalties to which he would be exposed in the event that he pleaded guilty. The record also reflects that prior to accepting petitioner's plea the Court, as an integral part of its Rule 11 colloquy with petitioner, thoroughly questioned him and his attorney to confirm his comprehension of the English language. It also appears that a competent interpreter was available to assist the petitioner at all pertinent times, cf. United States v. Diaz Berrios, 441 F.2d 1125, 1126-27 (2d Cir. 1971), but petitioner responded to all of the questions of the Court in English without requiring any assistance. In addition, there was a "penetrating and comprehensive examination of all the circumstances" under which the plea was tendered, Von Moltke v. Gillies, 332 U.S. 708, 724 (1948), and the Court's questions and petitioner's allocution support the conclusion that the plea was voluntarily, understandingly and knowingly made. McCarthy v. United

States, 394 U.S. 459, 464-67 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962).

At the hearing petitioner failed to adduce any facts whatsoever to support his allegations. His testimony was vague, ambiguous and hardly credible. Conversely, his attorney was able to recall the events with greater clarity and his testimony controverted petitioner's allegations. He testified that he made no representation to petitioner that he would receive a sentence for a given period of time that would run concurrently with petitioner's state incarceration. He also testified that he was under the distinct impression throughout the course of their association that petitioner understood their private conversations as well as the court proceedings. He also testified that from the outset petitioner had expressed his desire to plead guilty. It is clear, therefore, that petitioner's plea was predicated on consciousness of guilt.

There is no allegation here of outreaching conduct by the Court or the Government. See United States v. Mancusi, 275 F. Supp. 508, 515-16 (E.D. N.Y. 1967) (Weinstein, J.). Petitioner has the burden of establishing the invalidity of the plea, United States v. Lester, 247 F.2d 496, 500 (2d Cir. 1957), and as a collateral attack on constitutional grounds, "the weight of the burden

is a preponderance -- i.e., more probable than not." United States v. Mancusi, supra, 275 F. Supp. at 520, Johnson v. Zerbst, 304 U.S. 458 (1938). Since petitioner has demonstrated no objective basis upon which he reasonably could have inferred the alleged promise, United States v. Mancusi, supra, 275 F. Supp. at 515-16, it is highly probable that no such promise was made. In any event, we find that his attorney made no such representation to petitioner. Thus, on the broadest possible interpretation of this petition the most that can be said is that petitioner was under a subjective mistaken impression or belief that promises of leniency had been made. This circumstance, however, has consistently been regarded as insufficient to warrant the relief sought here. Mosher v. La Vallee, 491 F.2d 1346, 1347-48 (2d Cir. 1974); United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972); United States ex rel. La Fay v. Fritz, 455 F.2d 297, 302-303 (2d Cir.), cert. denied, 407 U.S. 923 (1972).

We are satisfied that petitioner's plea of guilty was entered "with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223 (1927); see also McMann v. Richardson, 397 U.S. 759, 766 (1970); McCarthy v. United States, supra, 394 U.S. at 466. Petitioner's disappointment with the sentence ultimately

imposed, even if based on an expectation inadvertently fostered by his attorney, does not vitiate the voluntariness of his plea. United States ex rel. Scott v. Mancusi, 429 F.2d 104, 108 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971); United States v. Caruso, 280 F.Supp. 371, 374 (S.D.N.Y. 1967), aff'd sub nom. United States v. Mauro, 399 F.2d 158 (2d Cir. 1968)(per curiam), cert. denied, 394 U.S. 904 (1969); United States v. Parrino, 212 F.2d 919, 921 (2d Cir.), cert. denied, 348 U.S. 840 (1954); cf. McMann v. Richardson, 397 U.S. 759, 774 (1970).

Moreover, after a careful review of the record and of the affidavits before us it cannot be said that the circumstances of petitioner's plea and sentence were such "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice" thereby rendering the assistance of counsel constitutionally defective. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Gonzales, 321 F.2d 638, 639 (2d Cir. 1963); United States v. Miller, 254 F.2d 523, 524 (2d Cir.), cert. denied, 358 U.S. 868 (1958). There is nothing to indicate that defense counsel's representation of petitioner at the plea, at the sentence, and thereafter, was so "'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests' . . . ." United States ex rel. Scott v. Mancusi, supra,